IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION ONE

STATE OF WASHINGTON, Respondent, v. DANIELLE OLAGUE, D.O.B. 04/21/90, Appellant.	)))))))))))	No. 63864-5-I UNPUBLISHED OPINION FILED: May 17, 2010

Ellington, J. — Danielle Olague appeals her juvenile court adjudication for vehicular homicide. We agree with Olague that evidence of her alcohol consumption should not have been admitted absent proof that her driving was impaired, and that her counsel was ineffective for failure to object. Because the trial court relied upon that evidence to convict, we reverse and remand.

BACKGROUND

In June 2007, 17-year-old Danielle Olague and her friend Ashley Magnusson invited Jeff Eklund and D.J. Thompson to spend the day with them at Alder Lake. Eklund and Thompson testified that the girls were already there when they arrived around 12:30 or 1:30 p.m.

Eklund and Thompson had consumed half a bottle of rum on the way to the lake

and also brought beer. They observed that Olague and Magnusson had two six-packs of Mike's Hard Lemonade and some beer. Three or four of the lemonade bottles were already open.

During the next several hours, the group took 84 photos with Olague's digital camera. Many of the photos show Olague and Magnusson posing with bottles of alcohol; a few show the girls with the bottles to their lips.

Eklund testified he only saw Olague take one drink that day, within the first half hour he was there. She drank none of the beer. There were four unopened bottles of hard lemonade when the group decided to leave at about 7:45 p.m. Olague threw the bottles away rather than drive with them in her car.

Thompson testified that he was already drunk when he and Eklund arrived and that he was "drunk the whole day," which is "why I kind of can't remember a lot of things."[1] He said he saw Olague with a lemonade bottle to her mouth "a couple times, a few times"[2] during the day, though he acknowledged she could have had more. Thompson said there was no more alcohol by the time they left the lake. In a pretrial interview, Thompson indicated that Olague and Magnusson consumed six or seven bottles of hard lemonade between them. In his statement to the State Patrol, Thompson said Olague and Magnusson consumed a 12-pack between them during a five hour period. On cross-examination, Thompson agreed that his statement to the State Patrol was "a lie" and said, "I don't know exactly how many between them."[3]

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[1] Report of Proceedings (RP) (Aug. 6, 2008) at 230.

[2] Id. at 237.

[3] RP (Aug. 7, 2008) at 291.

The group left the lake in two cars. Eklund and Thompson pulled out first. After what appeared to be a police car went by, Olague and Magnusson pulled out behind it. The police car turned down another street, and Olague put on speed to catch up with the boys.

The posted speed limit was 50 miles per hour (mph). A yellow triangular sign warning of an upcoming curve recommended a speed of 35 mph. As Olague approached the curve, she lost control of her car, which rotated and crossed over the oncoming lane of travel. The car left the roadway, vaulted through the air and struck the ground. It then struck a tree and came to rest upside down. Magnusson was fatally injured.

Olague's speed at the time of the accident was disputed. The State's expert estimated that Olague was traveling at 59.63 mph at the curve.[4] The defense expert estimated that she was traveling at 43 to 50 mph. Eklund testified Olague was driving around 55 mph as she began the curve. He recalled no sign cautioning drivers to reduce speed. In his statement to the State Patrol, Thompson estimated Olague's speed at 90 to 100 mph. At trial, he testified that with more driving experience since the accident, he would estimate her speed at between 70 and 80 mph.

Olague admitted to Washington State Patrol Trooper Jeremy James that she took the curve too fast. She said she was familiar with the road and had driven it in various conditions with no problems.

[4] Oddly, the trial court found that the defense expert testified Olague was "traveling 13–18 mph above the recommended speed of 35 mph." Clerk's Papers at 119. Olague assigns no error to this finding.

Olague told Trooper James she had not been drinking that day. Neither James nor any of the other three troopers at the scene saw any indication she was under the influence of alcohol or drugs. No blood or breath sample was taken. She was arrested for vehicular assault and taken to the juvenile detention center.

Trooper Erik Wickman was the primary accident investigator. During an inventory search of Olague's car, he found a digital camera and viewed several of the photos to see if they revealed any indication of ownership. They did not. Wickman logged the camera in as evidence. Detective Gundermann later asked Olague if the camera belonged to her. Olague stated that it was her camera, but it contained Magnusson's memory card. Gundermann removed the memory card and reinventoried it as a separate item.

Trooper Wickman later informed the detective that the photos showed Olague and Magnusson with alcohol. Gundermann asked Magnusson's father for permission to view, print, and use the photos as evidence, which he granted. Gundermann testified she would have sought consent to view the photos even if she had no idea what they depicted.

The State initially charged Olague with vehicular homicide under RCW 46.61.520, alleging that she "operate[d] a motor vehicle in a reckless manner."[5] The State later amended the information to allege both recklessness and disregard for the safety of others.

Olague moved to suppress the photos on grounds that Trooper Wickman's

[5] Clerk's Papers at 1.

inventory search of the camera was illegal. The court denied the motion and admitted the photos.

During closing argument, the State conceded it had not proved Olague's conduct was reckless and argued only that she demonstrated disregard for the safety of others. The State emphasized the evidence of Olague's drinking, and argued that her conduct exceeded ordinary negligence by "making a conscious choice when you're under 21, and at the time under the age of 18, to acquire liquor . . . and to consume it at the lake followed by a conscious decision to get behind the wheel of a motor vehicle."[6]

Relying heavily on evidence of her alcohol consumption, the court found Olague guilty of vehicular homicide.

DISCUSSION

Ineffective Assistance of Counsel

Defense counsel objected to admission of the photos as the fruit of an unlawful search, but did not advance an objection to the photos or other evidence of alcohol consumption based upon relevance or undue prejudice. Olague contends this amounted to ineffective assistance of counsel. To prevail, Olague must overcome a strong presumption that counsel was effective and must demonstrate there was no legitimate strategic or tactical reason for counsel's action.[7] She must also show that "but for counsel's unprofessional errors, the result of the proceedings would have been different."[8] Because her claim is based on counsel's failure to challenge the admission of evidence, Olague must show that an objection would likely have been sustained and

[6] RP (Aug. 13, 2008) at 857.

[7] State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

that the result of a trial would have been different had the evidence not been admitted.[9]

We see no strategic or tactical reason for counsel's failure to object to the evidence of the girls' alcohol consumption that day. The only issue was whether Olague was operating her vehicle with disregard for the safety of others. Disregard for the safety of others involves recognition and conscious disregard of danger.[10] Not only was there no affirmative proof that Olague's driving was impaired by alcohol, but none of the four troopers in contact with Olague at the scene even suspected that alcohol was a factor in the accident.

The State contends, without citing authority, that the activities of the afternoon were relevant to Olague's disregard for the safety of others "as an indication of her disregard for safety regulations that prohibit alcohol consumption by minor drivers," and could have had a "compound effect" in conjunction with her status as an intermediate driver and her "unsafe approach to the curve."[11]

This is speculation. Absent evidence of alcohol-related impairment at the time of the accident, evidence of alcohol consumption at some point in the several hours preceding the accident did not tend to make it more likely that Olague recognized and disregarded a danger to her passenger at the time of the collision. The evidence was

[8] Strickland v. Washington, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

[9] State v. Saunders, 91 Wn. App. 575, 578, 958 P.2d 364 (1998).

[10] State v. Lopez, 93 Wn. App. 619, 623, 970 P.2d 765 (1999).

[11] Resp't's Br. at 39.

therefore not relevant. An objection on this basis should have been sustained.

The trial court relied heavily on the evidence of alcohol consumption, inferring Olague's disregard for her passenger's safety from the fact she had disregarded laws prohibiting minors from drinking alcohol. Counsel's failure to object caused prejudice and constituted ineffective assistance.

Sufficiency of the Evidence

Olague contends the remaining evidence was insufficient to support a conclusion that she was driving with disregard for the safety of others. The usual standard of review applies.[12]

"To drive with disregard for the safety of others . . . is a greater and more marked dereliction than ordinary negligence. It does not include the many minor inadvertences and oversights which might well be deemed ordinary negligence under the statutes."[13] Rather, it involves conduct "more culpable than driving 'in such a manner as to endanger or be likely to endanger any persons or property.'"[14] The State therefore

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[12] In assessing the sufficiency of the evidence, the court views the evidence in the light most favorable to the State and decides whether any rational trier of fact could have found the elements of the crime beyond a reasonable doubt. State v. Luther, 157 Wn.2d 63, 77, 134 P.3d 205 (2006) (quoting State v. Townsend, 147 Wn.2d 666, 679, 57 P.3d 255 (2002)). A challenge to the sufficiency admits the truth of the State's evidence. State v. Salinas, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992). In the case of a bench trial, this court determines whether substantial evidence supports the challenged findings of fact and whether the findings support the conclusions of law. State v. Stevenson, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). Substantial evidence is that which is sufficient to persuade a fair-minded person of the finding's truth. Id. Unchallenged findings are verities on appeal, and conclusions of law are reviewed de novo. Id.

[13] State v. Eike, 72 Wn.2d 760, 766, 435 P.2d 680 (1967).

[14] Id. at 779 (Donworth, J., dissenting) (quoting RCW 46.61.525).

must present "[s]ome evidence of the defendant's conscious disregard of that danger."[15]

The court improperly relied on Olague's alcohol consumption.[16] As noted above, that evidence should have been excluded. The remaining evidence consisted of Olague's inexperience as a driver, her familiarity with the road, and her speed, particularly her effort to catch up with her friends.

Cases upholding convictions for driving with disregard have generally included evidence of egregious driving errors, such as travelling on the wrong side of the road.[17] For example, in State v. Eike, the defendant was "driving at 45 to 50 miles per hour on a dark, wet, but well-marked highway, rounding a sweeping curve on the wrong side of the road at night, into a head-on collision with an oncoming car."[18] In State v. Knowles,

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[15] Lopez, 93 Wn. App. at 623; accord State v. Vreen, 99 Wn. App. 662, 672, 994 P.2d 905 (2000), aff'd, 143 Wn.2d 923, 26 P.3d 236 (2001)).

[16] The court summarized: "[T]he fact that she has that intermediate license means she has to know the dangers of speeding, the dangers of disregarding the recommendations of the road engineers. She was drinking; and as an intermediate driver, she knows the risks of teenagers drinking any alcohol, whatsoever, and getting in a motor vehicle; and she did demonstrate disregard for the safety of Ashley Magnusson; and as a proximate cause of that disregard, Ashley Magnusson lost her life." RP (Aug. 14, 2008) at 896.

[17] See, e.g., State v. McNeal, 98 Wn. App. 585, 991 P.2d 649 (1999), aff'd, 145 Wn.2d 352, 37 P.3d 352 (2002) (evidence that defendant was driving on the wrong side of the road at the time of head-on collision supported finding that he was acting with disregard for the safety of others); State v. Miller, 60 Wn. App. 767, 807 P.2d 893 (1991) (evidence was sufficient under any of the three alternatives for vehicular homicide where defendant's blood alcohol level was .16 percent at time of accident and defendant was driving on the wrong side of the road with one headlight out); State v. Fateley, 18 Wn. App. 99, 566 P.2d 959 (1977) (evidence was sufficient under both reckless driving and driving with disregard for the safety of others where evidence showed defendant was intoxicated when he drove motorcycle across oncoming lane of traffic and off embankment, killing passenger).

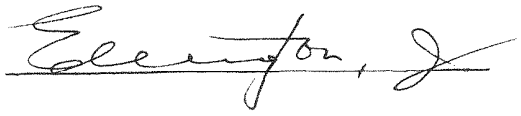
[18] 72 Wn.2d at 766.

the defendant admitted smoking marijuana and drinking beer before the accident, his blood alcohol content showed impairment, and he "drove into a blind curve, in the wrong lane, at a speed of at least 22 miles per hour over the posted cautionary speed."[19]

The evidence here shows fewer driving errors. It does show, however, that Olague was an inexperienced driver who took a curve at a speed higher than the posted cautionary speed, apparently in an effort to catch up with friends. It is for the trial court to determine whether these circumstances establish conscious disregard of danger. Remand is thus required for the court to apply the correct test to the evidence.

Lastly, Olague challenges the legality of Trooper Wickman's inventory search. But the court found that Detective Gundermann later obtained valid consent to search Magnusson's memory card. Olague does not assign error to that finding, which is a verity on appeal.[20] Because the court could properly admit the photos on that basis, the legality of the inventory search is moot.

Reversed and remanded for further proceedings consistent with this opinion.



WE CONCUR:

[19] 46 Wn. App. 426, 431, 730 P.2d 738 (1986).

[20] Stevenson, 128 Wn. App. at 193.

Leach, J.

Schindler, C.J.